Freedom of information

Gaining access: tapping official information laws in the US.

by Barbara Fountain

For a long time the freedom of information laws of the United States have shone like the holy grail of information access in the minds of New Zealand journalists, and others, raised in the British tradition of official secrets. The Constitution of the United States and its Bill of Rights with the First Amendment guaranteeing free press and free speech, have provided a strong foundation for access for over 200 years.

Certainly, the effectiveness of those documents and the rights enshrined in them have waxed and waned over the years. Likewise, the powers of government agencies such as the CIA, military, and the Presidency itself have fluctuated. But despite difficulties, the concept of people's right to information in a democracy has survived.

The federal Freedom of Information Act (FOIA) or "foy-ya" was passed in 1966. Later amendments were needed to make FOIA effective as a tool for promoting open government and it has become the model upon which open access legislation elsewhere in the West has been based.

For the United States the issue hasn't been a lack of legislation but enforcement of that legislation.

The secrecy which shrouded areas of the Republican administrations of Reagan and Bush put considerable stress on the law as the Presidency ultimately retains control over the atmosphere of information release through executive orders governing the classification of information. The indifference of Republican presidents Reagan and Bush filtered down through the bureaucracy leaving a legacy of suspicion towards those who seek access to official information.

Analogies can be drawn between the climate created by the Republican administrations and the climate in New Zealand, created by several years of change in the public sector.

In March 1994 I travelled to the United States as recipient of the University of Canterbury Robert Bell Travelling Scholarship, to investigate the use of freedom of information legislation by journalists. This paper draws from the scholarship report – *Freedom of Information – The experience of journalists in the United States*.

Official information in the United States

In the United States, application of the path-breaking federal Freedom of Information Act was plagued by a lack of resources and an, at times, uncooperative bureaucracy. Change was signalled by President Clinton who, in October 1993, released a memorandum promoting greater access to information. Clinton called on federal departments and agencies to "renew their commitment to the Freedom of Information Act, its underlying principles of government openness, and to its sound administration". Following the release of the President's memo, then Attorney General Janet Reno also released a memorandum on FOIA in which she rescinded the 1981 guidelines outlining the Department of Justice's approach to defending agencies in FOIA actions.

"The Department will no longer defend an agency's withholding of information merely because there is a 'substantial legal basis' for doing so. Rather, in determining whether or not to defend a non-disclosure decision, we will apply a presumption of disclosure," Reno announced.

This was an important turnaround as previously government agencies were able to spend considerable sums of taxpayer money defending the withholding of information which was withheld for the sake of it – not because release would cause harm. The financial resources of the US Government were obviously far greater than the majority of individuals seeking the release of official information and this was a major disincentive to people pursuing appeals through the courts.

FOIA requires a response within 10 days but few agencies are able to meet this. The Justice Department compiles a list of how well agencies respond and the agencies also have to furnish an annual FOIA report detailing how many requests they have received, how many have been dealt with, and the outcomes.

Every branch of the federal administration contains officials specifically committed to dealing with FOIA. The Justice Department's Office of Information and Privacy provides training for FOIA officers and others involved with FOIA. There appeared to be a genuine wish, at least from the co-directors of the Office of Information and Privacy, to improve attitudes within federal government towards FOIA.

An independent professional organisation, the American Society of Access Professionals, also provides back-up for FOIA officers and promotes changes in the bureaucratic culture.

An extra dimension to freedom of information in the United States is the existence of statutes at state and local level that can provide for access beyond that required by the federal FOIA. The laws differ greatly from state to state. For example, Illinois has something like 50 exemptions to its state FOIA, leaving little room for interpretation in the courts. Alabama, on the other hand, has a three-line public information act which just says information has to be given out.

The situation in California is intriguing. An ordinance introduced in San Francisco, promoting greater access to public records and public meetings, led to subsequent amendments improving the state level legislation (Figure 1).

The journalists

FOIA has a polarising effect on those using it but love it or loathe it, journalists spoken to wouldn't be without it.

Promises from the Clinton administration of improved access to information were met with scepticism as journalists saw little

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Figure 1 California legislation

In California two laws deal with access to information – the California Public Records Act and the Open Meetings Act (known as the Brown Act). Local authorities are free to produce regulations allowing greater access in their areas and in August 1993 San Francisco passed its trail-blazing Sunshine Ordinance. Sponsored by the Northern California Chapter of the Society for Professional Journalists, it was based on a model policy for local government agencies drafted by the FOIA lobby group – California First Amendment Coalition. The ordinance goes beyond the requirements of the state and federal legislation. It even goes as far as including provision for members of the public to be "passive" spectators, subject to space allowing, at social functions sponsored or organised by local bodies to which members of that body have been invited. The spectators are not entitled to partake of refreshments!

Other provisions include:

- •Acknowledging public employees' rights publicly to express their personal opinion on matters of public concern, as provided in case law under the First Amendment;
- •Requiring open meetings of standing committees of less than a quorum of the whole, whatever their composition;
- •Requiring "meaningful" meeting agendas, sufficient to alert a person of average intelligence and education whose interests are affected by a proposed action;
- •Requiring meeting-related back-up material to be made available on request even before being distributed to members of the body.

The SunshineOrdinance also requires that "citizen advisory groups" must open their meetings to the public. These groups are essentially task groups that give advice to policy makers. Many of the provisions in the Sunshine Ordinance have subsequently been included in amendments to the Brown Act.

evidence of greater resources available to deal with FOIA backlogs. However there was wide appreciation that the mere existence of the memo and its contents promised a significant improvement on the Reagan and Bush years.

Most journalists interviewed had experienced long delays when requesting official information and almost everyone – journalists and officials alike – agreed the law was of little use in daily news gathering. Its usefulness was, to some extent, dependent on the level of resources (mainly time) a media organisation was prepared to devote to investigative reporting. Journalists working in specialised areas were able to make greater use of the legislation and it was seen as useful for longer term projects. Making full use of the FOIA could lead to expensive legal bills and reporters generally needed the back up of their media organisation, or one of the FOI lobby groups, to undertake protracted battles for access to information.

Figure 2 Exemptions

Under FOIA information can be withheld under the following categories:

1 – national security;

2 – internal agency personnel rules;

3 – "Catch-All" exemption for information specifically exempted by dozens of other federal laws already on the books;

4 – trade secrets and confidential commercial information;

5 – internal agency memoranda and policy discussions;

6 – personal privacy;

7 – law enforcement investigations;

8 – federally regulated banks;

9 – oil and gas wells.

Broad interpretations of the exemptions (Figure 2) under which information can be withheld were seen as a major problem along with excessive delays in the processing of requests. Several journalists expressed concerns about pressures to strengthen privacy provisions in FOIA and the Privacy Act.

The quality of information obtained through FOIA varied widely.

Eve Pell of the Center for Investigative Reporting in San Francisco reported receiving newspaper clippings and presentation notes in reply to a FOIA request for information on negotiations between the Government and automobile companies.

"It didn't have anything to do with the nitty gritty I wanted. The stuff I wanted to know was covered by exemption 5 (deliberative process). If an agency wants to keep something secret, they can."

Ricardo Sandoval, also working at the Center for Investigative Reporting, used FOIA extensively when covering the Savings and Loan collapses for the *San Francisco Examiner*. He was able to obtain internal audits of banks, investigation material from the FBI, and in some cases, congressional information that had been sealed. However, Sandoval said, the legislation was full of protections and was of negligible use for real time reporting. Of a dozen FOIA requests filed, he said, maybe four were successful, two others were successful after some arduous lengthy negotiations. Of those six maybe two came in usable form. "More often the information that is withheld for protection of the innocent is hiding the guilty."

Joseph Goulden of Accuracy in the Media Inc. recently received documents from the CIA. Requested about 10 years previously for a book (published some time ago), the papers still contained large sections of totally blacked out text.

It was widely recognised that journalists needed to make an effort to use the legislation. Investigative Reporters and Editors managing editor Steve Weinberg commented that some journalists didn't really know the legislation existed, others were not curious enough to try using it, and a growing number had heard such discouraging stories about the success of the Act that they didn't bother trying. Weinberg said he avoided using the Act wherever possible because of the time delays and preferred to try and get information directly from agency public affairs officers.

Center for Investigative Reporting managing editor Dan Noyes said the Center could often benefit for having someone who was a specialist on the Act – keeping up to date with changes in the state laws and looking at how FOIA could be applied to all the Center's projects.

The proliferation of electronic databases raised new problems for FOIA and journalists agreed that clarification of the status of electronic records was needed. Traditional archives have been opened up providing more routes on the classic paper trails but the ➢

future could bring an electronic system fraught with all the traditional problems of information storage retrieval.

The lobby groups

FOIA in the United States has had the benefit of a wide range of lobby groups – media and consumer based – dedicated to promoting the law and fighting against the withholding of information.

The Reporters Committee for Freedom of the Press was started by journalists with a legal background who realised there was a lack of legal support for journalists. The Freedom of Information Clearinghouse, funded by consumer activist Ralph Nader's Public Citizen group, assists people making requests and taking appeals against the withholding of information. The Freedom of Information Center, started by media organisations, collates information on federal and state access laws providing a valuable resource for journalists trying to keep abreast of case law and changes to the numerous state laws. The American Civil Liberties Union also addresses access issues.

Trail-blazing amendments to California law and the Sunshine Ordinance in San Francisco came about as a result of lobbying by media - not just journalists but editors, publishers and broadcasters involved in the California First Amendment Coalition. The Coalition lists among its aims documenting and reporting persistent violations of the law affecting freedom of information; publicising law reforms; encouraging government to adopt voluntary policies on information release; educating public officials to the requirements of the laws; and providing research to help editorial writers, lobbyists, legislators and attorneys to support improvements in the law.

Many of these groups publish material explaining the legislation and assisting people wishing to make requests. These can include a simple explanation of the law and sample request letters.

Lobby groups were also concerned that the balance between access to information and privacy was going too far towards privacy. As Rebecca Dougherty of Reporters Committee for Freedom of the Press commented, there is increasingly a battle between the need for open access and concerns about privacy with a lot of "well-intentioned groups" fuelling the push for privacy.

Gary Stern of the American Civil Liberties Union believed that in some instances the courts had gone too far in the direction of privacy and had withheld information.

Lucinda Sikes of the FOI Clearinghouse said FOIA's exemption 6, relating to privacy, had been interpreted by the Supreme Court as a balance between public and private interest. The court had said, when weighing the public interest account can only be taken of how fulfilling a request will reveal information about an operation and activity of government.

For instance, Sikes said, the Centre for Auto Safety wanted names and addresses of people who had complained about cars. For years they were able to get this information and write to those people to find out more about their car problems. After the Supreme Court directive the government agency involved refused to release the information any longer, saying there may not be a privacy interest but there was very little public interest in these names and addresses! Sikes, along with many others, supported provisions for a better expedited treatment process so information needed urgently would get processed quicker.

Reducing delays by increasing resources and reducing the amount of classified material were the main changes called for by those using the legislation.

In the absence of further resources to reduce request backlogs, alternative solutions were available, according to law professor Eric Sinrod[1]. His recommendations on how to reduce the backlog included: expediting urgent requests; processing simple requests separately from complex requests; amending the standard FOIA response deadline from 10 days to 20 working days; and implementing specialised FOIA procedures for certain agencies.

Generally, success in the use of FOIA has relied on a dogged approach by reporters and lobby groups. Little information is handed on a platter.

But overall the move towards openness in the United States has been fuelled by effective lobbying and pressure from media and public interest groups. The question then is, can it be similarly fuelled in New Zealand?

Official information in New Zealand

The change from a currency of official secrets to official information required a major turnaround in thinking for New Zealand politicians and bureaucrats, as for their counterparts elsewhere in the world.

In 1978 the Committee on Official Information, known as the Danks Committee, was charged with reviewing the Official Secrets Act and contributing "to the larger aim of freedom of information by considering the extent to which official information can be made more readily available to the public". It tackled the charge with fervour but recognised the limits of laws alone.

> "The effectiveness of the reforms recommended by the Committee will depend largely on the attitudes of those directly concerned – not only of ministers and officials, but also individuals, interest groups, and the public media...By making intelligent and fair use of the official information that is made available, the interest groups and the media can in turn encourage ministers and officials to adopt a still more open approach, and thus speed up the process of change."[2]

The Official Information Act was enacted in 1982 and the Local Government Official Information and Meetings Act (LGOIMA) in 1987. Where the Official Secrets Act had assumed that "official information is the property of government, and should not be disclosed without specific reason and authorisation"[3], the new Act tended towards the view that information should be made available unless there was good reason to withhold it.

In recent years in New Zealand the introduction of state-owned enterprises and downsizing of government departments has put some limits on the application of the OIA. A glance through the first *Directory of Official Information* published in 1983 reveals a number of organisations not listed in the 1994 issue – either because they no longer exist or have been privatised.

Likewise, changes at local government level have distanced the public, and at times councillors, from decisions about council assets.

Over a similar period of time the economic situation has seen some newsrooms reduce staffing, putting more pressure on time and resources. Journalists who have used the Act have complained, in some cases, of lengthy delays in the release of information – delays they often view as tactical on the part of officials not wishing to release politically sensitive material.

The [former] Chief Ombudsman, John Robertson, noted those concerns in his 1993 annual report to Parliament. Robertson was critical of successive governments and officials over the last decade who, he said, had failed to appreciate the first stated purpose of the Act, which is:

"(a) to increase progressively the availability of official information to the people of New Zealand in order –

(i) To enable their more effective participation in the making and administration of laws and policies; and

(ii) To promote the accountability of Ministers of the Crown and officials – and thereby to enhance respect for the law and to promote the good government of New Zealand."[4]

An "important social doctrine" was encapsulated in this purpose, Robertson said. "Clearly this purpose contemplates that authoritative information about government proposals for change of policy, or for major decisions affecting the lives of people, should be available to the public for debate before decisions are taken. 'Effective participation' does not mean that the public should sit in the councils of government when decisions are taken. What it does mean is that the public should be able to debate the issues involved ..."

A major threat facing access to information in New Zealand is the gradual diminution of the public sector and movement of state assets, including information, into the private sector. This was recognised by former ombudsman Nadja Tollemache who, in her "Report on Leaving Office", stated:

"Information which was accumulated by administration and research funded by the taxpayer and previously freely, and free of charge, available to the public, had come into the control of commercially oriented organisations which either seek to profit from it or exclude the public from access."[5]

With reference to health sector restructuring Tollemache said there was much information held by health organisations "which I hope, for the sake of research and accountability, will not go the same way as information formerly held by ministries of Works, Energy, Education authorities and, now, incorporated bodies."

Possibilities for New Zealand

New Zealand journalists have a major advantage over their US colleagues in dealing with information access – the size of our bureaucracy is small in comparison and there is no evidence of major request backlogs.

The successful application of our laws in news gathering is almost totally dependent on journalists and, to a lesser extent, the support of media organisations. This doesn't mean that the law can't be frustrated by government officials but that the success of the Act for news gathering is dependent on journalists actually using it. In fact, from its inception it was recognised that the effectiveness of OIA depended largely on those who were to use it.

Journalists need to know the law. Practice guidelines and case notes produced by the Ombudsman, which explain decisions made regarding the Act, are useful references. Journalists should note that section 13 of the OIA (and section 11 of LGOIMA) includes the requirement that government officials assist requesters in accessing information. Practice guidelines released by the Office of the Ombudsmen state:

"If the information requested cannot be identified s.13 of the Act imposes a duty on the recipient of the request to give reasonable assistance to the requester to make the request in a manner that is in accordance with [the Act]. Reasonable assistance requires more than stating that the request is not specific enough. In many cases requesters simply do not have sufficient knowledge of the precise nature of the information they are seeking, or the form in which it is or may be held, to be more specific."[6]

Journalists should be encouraged to make more use of the Act. In the year ended 30 June 1992, 12 per cent of the complaints to the ombudsman relating to the OIA came from the media. In 1993 it was 13 per cent. It would be comforting to assume that the low number of complaints indicated media requests for information were being met; the alternative assumption is that the media is not making wide use of the Act.

A [former] senior investigating officer in the Office of the Ombudsmen, Liz Brown, said reporters needed to be more careful about how they framed requests. "But for some reporters it is just a case of remembering it (the Act) is there.If they have asked for factual information then they have made a request under the Act."

Journalists need to know what type of information is available. The *Directory of Official Information* provides some information but individual reporters need to find out exactly what type of files are held by departments they deal with. Holding such information would enable much speedier filing of requests. Like the United States, it is arguable whether OIA will ever be of great use in daily news gathering but if a journalist is well informed about the records held by a department and knows of the existence of information of strong public interest, then the OIA does have urgency provisions providing for release in three days.

As new technology enters the work place, media organisations should investigate and publicise what records are already available electronically and push for greater on-line access. This will increase the speed of access to official records.

Attention should be paid to how much training on OIA is given to government employees. In the editorial of his 1993 report[7], John Robertson pointed to the need for training of government officials in the use of the Act, given that there have been so many changes in the state sector since the Act was first brought in. Inefficient administration of the Act by government employees is costly for the taxpayer. The need for good training was well recognised in the US by the Justice Department.

Robertson also makes a link between lack of training and some of the delays experienced by requesters. "Each Ombudsman is aware that there is disquiet among those using the Act, particularly the media, about delays in accessing the required information. The best improvement will come when chief executives insist on internal procedures and training for dealing with requests."

In the first five years after OIA was introduced an Information Authority was responsible for educating people about the Act and examining existing legislation for compliance with OIA. When the Authority was disbanded the task of monitoring legislation fell, almost by default, on the Office of the Ombudsmen. The role of on-going training was not resolved

The Law Commission has also emphasised the importance of good practice by government officials. "Such practice has to be supported by steps such as the issuing of guidelines and the holding of training seminars."[8]

The Commission also suggested that government consider whether a single department be given clear and major responsibility for the administration of the 1982 Act. "That responsibility would include the issuing of relevant guidelines, the running of appropriate seminars, and being the central repository of knowledge and advice."[9] This sounds like a call for a permanent version of the defunct Information Authority.

The public profile of the legislation needs to be raised. In San Francisco the local chapter of the Society of Professional Journalists presented awards to people for making good use of the legislation – not just journalists but librarians, officials and students. A national FOIA day publicises issues for the public at large. In New Zealand the State Services Commission and Department of Justice have produced material on the Act and some media organisations have produced material for internal use.

But the public needs to appreciate that information access is not just a media issue. In view of the growing concerns regarding privacy – the public perception that media is often willing to disregard privacy – it is doubly important that the public understands the importance of access in keeping government accountable. The New Zealand public also needs to be made more aware of its rights to information so that when those rights are threatened members of the public will know what is at risk.

There is a strong argument for media in New Zealand to form a watchdog/advocacy group to lobby for access rights; assist in training journalists in their application; and monitor performance by government departments. Given the small size of our bureaucracy such as group is likely to be effective. Media groups in New Zealand are in close competition but this shouldn't rule out co-operation in this area. In California, the California First Amendment Coalition successfully brought together representatives from the industry and general public to lobby for adherence to state and federal access laws

Conclusion

Journalists need to make use of the existing legislation and realise that, in the absence of any other driving forces, they themselves have to advocate for improved access. I suggest New Zealand media groups need to:

- encourage use of the law by journalists;
- increase the public profile of the legislation;
- pressure the Government to renew its commitment to open access to information;
- invest in technology to increase direct access to files by-passing the paper trail.

A coalition of some sort could be the best way of achieving these aims. This would need to be funded through grants and contributions. While there may be some reluctance among media to be involved in any type of watchdog/lobby group, the reality is journalists do have a vested interest in this area and should not rely on other groups to protect it.

Postscript - 1997

In the 1995/96 annual report of the Ombudsmen[10] Chief Ombudsman Sir Brian Elwood and Ombudsman Anand Satyanand note they received 1165 complaints about ministers and government agencies relating to the Official Information Act. Of those complaint, 823 were outright refusals to supply information and 211 were delays deemed to be refusals. Over half of the refusals to supply information were found in favour of the complainant.

In his report to the government administration select committee in March 1997[11] , Sir Brian said continuing problems over delays in receiving information from government ministers were such he had considered appealing to the Prime Minister.[12] He noted that whenever there is a significant change in the government or senior hierarchy of a government agency, "especially when the new appointees are from outside the public sector", an amount of education as to the purpose of official information legislation is required.

Sir Brian said a greater investment in encouraging an understanding of the legislation would contribute to information being released in a timely manner without direct Ombudsman participation. However, the office is fully stretched in terms of its available resources and workload.

A good indication of the official information climate was revealed in research gathered by civil servant Evan Voyce.[13] Senior public servants interviewed by Mr Voyce for a Masters in Public Policy research paper said they were concerned they had been told to dispose of written advice to the Government after it was rejected. Mr Voyce said that ministers had instructed that information be destroyed because they did not want it known they were going against advice from officials or that particular policies were not getting the expected results.

In the 1995/96 annual report the Ombudsmen note they have seen a growing recognition of the Official Information Act by the print media.

"Newspaper reports regularly refer to information having been obtained under the Act. We consider this is an encouraging sign because the media thereby show that the Act does work to get access to official information."

However, of the 1165 complaints received regarding the OIA, only 13 per cent came from the media – not a significant increase over figures given earlier in this paper for 1992 and 1993. This could indicate either journalists have not significantly increased their use of the Act or that government agencies are becoming more compliant in their response to requests. The latter seems unlikely given the increasing corporatisation of the state sector and the problems already noted by the Ombudsmen with staff moving in from the private sector. There is still room for improved use of the Act and a need to lobby Government for improved compliance. ■

References

1. "Freedom of Information Act response deadlines: bridging the gap between legislative intent and economic reality", *American University Law Review.*
2. *Towards Open Government* (1981), General report of the Committee on Official Information (Danks Committee).
3. *Towards Open Government.*
4. Official Information Act 1982 section 4.
5. Included in the Report of the Ombudsmen for the year ended 30 June 1992.
6. "Practice Guidelines 1" (revised), Official Information Act 1982 and Local Government Official Information & Meetings Act 1987 - Application of Administrative provisions, Office of the Ombudsmen (1993).
7. Report of the Ombudsmen for the year ended 30 June 1993.
8. "Official information: recommendations for legislative and practical development" (draft report), *Law Commission*, December 1993.
9. *op. cit.*
10. Report of the Ombudsmen, for the year ended 30 June 1996.
11. Report to Government Select Committee, March 1997, Office of the Ombudsmen.
12. "Minister too slow with information - ombudsman", *The Dominion*, 21 March 1997.
13. "State servants told: shred papers (Ministers thwart information act)", *The Dominion*, 6 June 1997.